

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

74-14067

To be argued by
FRANK A. LOPEZ

In The
United States Court of Appeals
For The Second Circuit

SALVATORE MANGIAMELLI,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

*On Appeal from the United States District Court
For the Southern District of New York*

**REPLY BRIEF AND ADDENDUM
FOR PETITIONER - APPELLANT**

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TABLE OF CONTENTS

Brief	Page
Preliminary Statement	1
Point IV. (In reply to Government's Brief Point II) Mangiamelli's depriv- ation of counsel amounted to inef- fective assistance aggravated by Jury misconduct and the District Court's failure to accord appellant due process. . . .	2
Conclusion	4
Addendum - Additional annotations of in- competency of defense trial counsel. . . .	5

Cases Cited:

Brookhart v. Janis, 384 U.S. 1 (1966)	3
Henry v. Mississippi, 379 U.S. 443 (1965) . .	3

Statutes Cited:

28, United States Code, Section 2255	1, 2
18, United States Code, Section 371	5

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-1467

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SALVATORE MANGIAMELLI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

-----x

PRELIMINARY STATEMENT

Salvatore Mangiamelli appeals from an order entered February 26, 1974 in the United States District Court for the Southern District of New York by the Honorable Edmund L. Palmieri, United States District Judge, denying without a hearing Mangiamelli's motion, pursuant to Title 28, United States Code, Section 2255 to vacate his conviction and sentence.

This reply concerns Point 11 of the Government's answering Brief to the effect that "Mangiamelli's deprivation of Counsel Argument is Without Merit".

POINT IV

(IN REPLY TO GOVERNMENT'S BRIEF
POINT II) MANGIAMELLI'S DEPRIVATION
OF COUNSEL AMOUNTED TO INEFFECTIVE
ASSISTANCE AGGRAVATED BY JURY MIS-
CONDUCT AND THE DISTRICT COURT'S
FAILURE TO ACCORD APPELLANT DUE PROCESS.

The Government attempts to vindicate the Jury misconduct and the District Court's failure to adequately protect Mangiamelli by the specious argument that a "team of lawyers who prepared the brief (on direct appeal), which did not include Mangiamelli's trial counsel, made no such claim 'as to ineffective assistance of counsel'" (Gov't. Brief, p.7). Yet the Government claims in its Point I that a §2255 petitioner like Mangiamelli cannot raise on collateral attack issues which were actually disposed of on direct appeal (Gov't. Brief, p.6). We thus have a concession by the Government that this is not a mere attempt by Mangiamelli to relitigate old issues under new labels but represents an issue not contemplated by the direct appeal from conviction.

Moreover, the Government's reliance on defense counsel's conduct not amounting to a farce and mockery of justice or poor and even disastrous trial strategy (Gov't. Brief, p.7) skirts the real issue in a blanket

endorsement of the trial Court's actions having received the implied consent of Mangiamelli's trial counsel. The Government fails to answer the guidelines announced in Henry v. Mississippi, 379 U.S. 443 (1965) and Brookhart v. Janis, 384 U.S. 1 (1966), as to defense counsel exacting a binding waiver from Mangiamelli as to his preclusion from important proceedings during the course of his trial. The "waiver by trial strategy" is certainly inapplicable under the "exceptional circumstances" of this case.

It is also clear that the legal barriers of "farce" and "mockery of justice" are recognized as placing upon defendants an impossible burden in proving that they were accorded less than due process legal representation and flouts the general and personal observations of the Chief Judge of this Court as to the general competency of counsel appearing in the trial and appellate courts in criminal matters.

Mangiamelli is thus thwarted in his extensive allegations of defense counsel's ineffective legal assistance during trial and in laying bear his claims. Recognizing

the present legal precedents as to legal incompetency amounting to "farce" and a "mockery of justice" the instant argument of ineffectiveness is not only directed towards defense counsel but to the interplay of the functions of Jury, trial Judge and also defense trial counsel amounting to a due process argument for the vacatur of Mangiamelli's judgment of conviction¹ or at least to a fact hearing affording Mangiamelli an opportunity to establish his contentions.

CONCLUSION

Upon all the facts and law set forth herein, we move this Court for an evidentiary hearing and/or a new trial together with such other and further relief as may be just and proper in the circumstances.

Respectfully submitted,

s/ Frank A. Lopez

FRANK A. LOPEZ
Attorney for Appellant
Salvatore Mangiamelli

* Attention is called to the addendum included herein which suggests Mangiamelli's observations of additional deprivations of competent counsel and legal representation at the time of trial.

ADDENDUMADDITIONAL ANNOTATIONS OF INCOMPETENCY
OF DEFENSE TRIAL COUNSEL.

On September 2nd, 1971, the United States District Court for the Southern District of New York filed Indictment No. 71 CR 1006 charging Salvatore Mangiamelli, Melvin Allen Kronn and Gennero Ciprio, with violation of 18 USC Section 371.

On November 4th, 1971, a superseding indictment to the above was filed, in nine counts, in the United States District Court for the Northern District of Illinois charging Kronn and Ciprio with dealing in stolen securities moving in interstate commerce.

Trial on Indictment No. 71 CR 1006 commenced September 6th, 1972 with privately retained counsel for Mangiamelli.

Appearing as the Government's key witness against Mangiamelli was his co-defendant Kronn who testified that towards the end of August, 1970, in the presence of Ciprio, he went to a boat basin in Brooklyn and went aboard an 18/20 foot cabin cruiser. The testimony of Kronn further described the entry to the cabin cruiser was made by undoing the aft curtains and unlocking the

cabin door. Kronn further testified that Ciprio had advised him that this boat was the property of Sal Mangiamelli, as certain securities were uncovered for the introduction on the illegal market.

Defense counsel negligently failed to offer into evidence, upon cross-examination of Kronn, a photograph in his possession of a runabout Mangiamelli owned and had sold some three (3) months prior to the alleged meeting between Kronn and Ciprio on some unknown cabin cruiser. The photograph, if produced by defense counsel would have proven to the Jury that Kronn's testimony was completely false and that a "cabin cruiser" is distinctly different than the 18 foot runabout Mangiamelli sold in May, 1970.²

Defense counsel further failed to produce George Theophilis as a vital defense witness who was willing to travel from California to New York to testify that the runabout owned by Mangiamelli was sold to him on April 5th, 1970; a runabout accidentally sunk by him on that same date; a runabout that in June, 1970 was taken out

2. The photograph is available.

of repairs and stored at Bayonne, New Jersey.³

At another point during trial Kronn testified that "about the first week of September 1970" he met Ciprio at some "Jerry's Stand" in Manhattan to return certain securities. Kronn further testified that while at this "Stand" Mangiamelli appeared. Months prior to trial defense counsel was furnished names, addresses, of crucial defense witnesses, in addition to summaries of their expected testimonies. These witnesses would have testified that it was physically and medically impossible for Mangiamelli to be outside his home from August 23 to September 18, 1970.⁴ Not a single witness was called by defense counsel, but rather he completely ignored the telephonic requests of the witnesses to appear and testify in Mangiamelli's behalf. Although defense counsel prepared a Subpoena issued from the District Court seeking the production of Mangiamelli's medical records from Staten Island Hospital, necessary to prove that because of his period of hospitalization for a

3. Affidavit of Theophillis is available.

4. Affidavit and summaries are available.

surgical operation it was physically impossible to be in Manhattan on any date Kronn alleges during trial, defense counsel neglected to execute the Subpoena and the critical medical records were not introduced during trial.

Defense counsel during the course of the trial agreed to a stipulation not only damaging to the defense, but permitted the prosecution to wilfully and knowingly present false evidence against Mangiamelli. The stipulation indicated that Telephone Number 232-9535 was that of Gennaro's Feast Specialities owned by Jerry Cipriro. Without this stipulation the prosecution would have completely failed to prove its nebulous case involving Mangiamelli. Had defense counsel performed the basic duties owed his client the stipulation would not have been entered and records could not have been suppressed during trial that would have demonstrated that Mangiamelli was the owner of Gennaro's Feast Specialities, thereby giving him the legal right to use 232-9535 as his business telephone number.

During its charge to the Jury, the Court stated that "there is no question that if a Phone Company Representative had come, he would have testified that the telephone

number 232-9535 was the telephone number of the restaurant of Jerry Ciprio in Brooklyn." Defense counsel not only failed to object to this portion of the charge by the court, but failed to produce the available records clearly showing 232-9535 as Mangiamelli's business telephone number from March 21st, 1969 to May 18th, 1970.

The trial court, itself, further magnified the deliberate or negligent errors of trial counsel entering into such a false damaging stipulation, when it stated "that the defendant Salvatore Mangiamelli gives his business telephone number as 232-9535 which, in accordance with the provisions of the stipulation, is the telephone number of Ciprio's Restaurant in Brooklyn." The deliberate negligence of defense counsel in failing to present available records reflecting Mangiamelli as the owner of Gennaro's Feast Specialities entitling him to list 232-9535 as his business phone, caused the prosecution to win its case solely by the use of false innuendos and fraud.

Defense counsel, without Mangiamelli's knowledge or consent, caused the Jury to receive for its inspection

copy of the indictment that contained a note clearly stating "Ciprio murdered. This is the inadmissible evidence." The jury foreman advised the court through an ex parte note that all members of the Jury had read the notes handwritten on the indictment. Following a hearing without Mangiamelli's presence on this issue the Court advised defense counsel to renew his motion for mistrial if and when a guilty verdict is returned. Counsel failed to renew the motion for mistrial when the guilty verdict was returned.

On November 20th, 1972, Mangiamelli appeared before Judge Palmieri for sentencing and solely because of records falsely reflecting a new life time criminal record stretching from desertion from the Army in World War II, rape, extortion, attempted murder, robbery, possession of stolen property, consorting, etc., Judge Palmieri pronounced a maximum sentence of 5 years. Great emphasis was placed on the failure to produce statements of Mangiamelli's financial background. Prior to sentencing defense counsel was furnished Income Tax Returns for the years of 1967 through 1971, which

satisfactorily demonstrated that Mangiamelli had been steadily and gainfully employed during that period of time. Defense counsel failed to make these same financial statements available to the sentencing judge.

U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

MANGIAMELLI,
 Petitioner-Appellant,
 against
 U.S.A.,
 Respondent-Appellee.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, James Steele, being duly sworn,
 deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
 250 West 146th Street, New York, New York
 That on the 26th day of June 1974 at Foley Square, New York
 deponent served the annexed Reply Brief upon

Paul J. Curran-U.S. Attorney Southern Dist. - Attorney for Appellee

the in this action by delivering a true copy thereof to said individual
 personally. Deponent knew the person so served to be the person mentioned and described in said
 papers as the Attorney(s) herein,

Sworn to before me, this 26th
 day of June 1974

Print name beneath signature

JAMES STEELE

ROBERT T. BRIN
 NOTARY PUBLIC, STATE OF NEW YORK
 NO. 31 - 0418950
 QUALIFIED IN NEW YORK COUNTY
 COMMISSION EXPIRES MARCH 30, 1975



